

Land Board Agenda Item
January 22, 2008

Land Banking Administrative Rule Amendment

During the 2007 Legislative Session Senate Bill 131 was passed to modify 77-2-363 Land Banking Land Sales and Limitations and 77-2-364 Land Banking Purchases.

As a result of these changes the Administrative Rules of Montana 36.25.801 thru 36.25.817 implementing the statutes must be amended to incorporate these changes.

Changes to 77-2-363, MCA with the passage of SB131 are as follows:

- Extend the Land Banking Program's sunset date from 2008 to 2011. This will allow the program's effectiveness to be reviewed again, and its fate to be determined at a later time.
- Shorten the number of days prior to auction that bid deposits must be received from 45 to 20. The reason for this requested revision is that the DNRC has received several complaints that the 45 day requirement is onerous when trying to secure loans.
- Decrease the bid bond amount from 50% to 20% of the minimum bid. Comments from potential bidders indicate that this requirement has prohibited them from participating in the auction process.
- Provide for the collection of funds from the prospective purchaser prior to the state incurring the costs of sale related expenses. Preparing state trust lands for sale requires an appraisal, cultural/paleontologic resources survey, land surveys, and advertising. These services are typically contracted by the DNRC in preparation of the sale, and the costs are reimbursed to the State by the applicant at closing.

The change to 77-2-364, MCA with the passage of SB131 is as follows:

- An increase from 20 years to 60 years for the accounting period concerning forested land when estimating the rate of return on acquisition properties. All other lands would continue to be evaluated over a 20 year accounting period.

Senate Bill 213

In accordance with Senate Bill 213, the department has amended language in 36.25.805(9) to include the requirement that all parcels under consideration for sale, exchange or acquisition, be appraised by a Montana-licensed certified general appraiser.

**Attached are the Administrative Rules of Montana 36.25.801 thru 36.25.817
showing amendments to reflect the above statute changes.**

TIMELINE

February 4, 2008	File Hearing Notice with Secretary State's Office Notify Bill Sponsor Notify Negotiated Rule Making Committee
February 14, 2008	Hearing Notice Published in the Montana Administrative Register
Date to be announced	Hearing held
Date to be announced	Comment period ends
Date to be announced	Adoption Notice sent to Land Board for final approval
Date to be announced	File Adoption Notice with Secretary of State's Office
Date to be announced	Notice of Adoption published in the Montana Administrative Register
Date to be announced	Rules become effective

Recommendation:

The Director recommends that the Land Board authorize the initiation of the rule making to amend ARM 36.25.801 thru 36.25.817.

BEFORE THE BOARD OF LAND COMMISSIONERS AND
THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION OF THE STATE OF MONTANA

In the matter of the proposed)	NOTICE OF PUBLIC HEARING
amendment of ARM 36.25.801, ARM,)	ON PROPOSED AMENDMENT
36.25.804, ARM 36.25.805, ARM)	AND REPEAL
36.25.807, ARM 36.25.808, ARM)	
36.25.810, ARM 36.25.811, ARM,)	
36.25.812, ARM 36.25.815, and the)	
proposed repeal of ARM 36.25.806)	
regarding the land banking program)	

To: All Concerned Persons

1. On [DATE], at [TIME], the Department of Natural Resources and Conservation will hold a public hearing in [LOCATION], Helena, Montana, to consider the amendment and repeal of the above-stated rules.

2. The department will make reasonable accommodations for persons with disabilities who wish to participate in the rulemaking process and need an alternative accessible format of this notice. If you require an accommodation, contact the department no later than 5:00 p.m. on [DATE], to advise us of the nature of the accommodation that you need. Please contact Emily Cooper, 1625 11th Avenue, Helena, MT 59620; telephone (406) 444-4165; fax (406) 444-2684; or e-mail ecooper@mt.gov.

3. The rules as proposed to be amended provide as follows, stricken matter interlined, new matter underlined:

36.25.801 DEFINITIONS As used in this subchapter, the following definitions apply, except where the context clearly indicates otherwise:

~~(1) "Annual rate of return" means the annual return divided by the asset value multiplied by 100%.~~

(1) "Accounting period" means the interval of time used to calculate and compare investment decision criteria for various land classes.

(2) "Annual return" means the net annual income.

(3) "Asset value" means the value of an asset as determined by appraisal or purchase price.

(4) "Average annual rate of return" means the average annual return over the accounting period, divided by the purchase price, and multiplied by 100.

~~(4)~~ (5) "Bid" means a written or oral monetary commitment to purchase land or interest in land offered at the specified time and place by a person eligible to participate in an auction, as specified by the department in accordance with 77-2-363, MCA.

~~(5)~~ (6) "Bid bond" means bid deposit, as defined in ~~(6)~~ (7).

~~(6)~~ (7) "Bid deposit" means a certified check or cashier's check drawn on any Montana bank equal to ~~50%~~ 20% of the minimum sales price submitted in

connection with a bid as an assurance of the performance of a contractual or promissory requirement.

~~(7)~~ (8) "Board" means the state Board of Land Commissioners.

~~(8)~~ "Current annual rate of return" means the average annual return for three years divided by the purchase price and multiplied by 100%.

(9) "Department" means the department of Natural Resources and Conservation.

~~(10)~~ "Earnest money" means a sum of money paid by a prospective purchaser as proof of that person's intention to complete the purchase transaction.

(10) "Estimated costs" means the estimated costs to prepare the parcel for sale, including but not limited to appraisal fees and archeological surveys.

(11) "Lessee" means the current lease holder of any agricultural, grazing, commercial, cabin or home site, or other surface lease of state trust land.

(12) "Net annual income" means total revenues from all sources less total average expenses from all sources based on all available cost information, including information in the "Report on the Return on Asset Value by Trust and Land Office for State Trust Land."

(13) "Net Present Value" means the sum of the discounted net annual income over the accounting period.

~~(13)~~ (14) "Parcel" means one section or less that can be identified by legal description, independent of any other parcel of land, using documents on file in the records of the county clerk and recorder's office or in the department's records.

(15) "Processing costs" means estimated costs of preparing the parcel for sale, including but not limited to appraisals, cultural surveys, environmental review (pursuant to Title 75, chapter 1, parts 1 through 3) and land surveys.

~~(14)~~ (16) "Report on the Return on Asset Value by Trust and Land Office for State Trust Lands" means the annual report produced to analyze the rates of return originating on trust land on land classified as forest, agricultural and grazing, and other.

~~(15)~~ (17) "Tract of record" means a distinct portion of land, irrespective of ownership, that can be identified by legal description, independent of any other portion of land, using documents on file in the records of the county clerk and recorder's office.

~~(16)~~ "20-year average annual rate of return" means the sum of the annual rates for return for the most recent 20 consecutive years divided by 20.

AUTH: 77-1-328, 77-2-362, MCA

IMP: 77-2-328, 77-2-363, MCA

36.25.802 LAND BANKING TRANSACTION COSTS (1) Except as provided in 77-2-362(2)(c), MCA, the department may use up to 10% of the proceeds deposited in the land bank fund to pay costs of transactions, as provided in 77-2-362(2)(b), MCA.

(2) The department may not be compensated for transaction costs of services performed by department staff.

(3) The department shall:

(a) maintain a record of each transaction;

(b) summarize transaction costs at the completion of each sale or acquisition;
and

(c) include an accounting of transaction costs in the report required by 77-2-366(2), MCA. (History: 77-2-362, MCA; IMP, 77-2-362, MCA; NEW, 2004 MAR p. 2399, Eff. 10/8/04.)

36.25.803 CONSIDERATIONS IN THE SALE OF STATE TRUST LAND PURSUANT TO LAND BANKING (1) The board may only sell a parcel that is wholly surrounded by other public land if the board provides compelling reasons for the sale.

(2) The board may only sell a parcel that is wholly surrounded by land under conservation easement if the board provides compelling reasons for the sale.

(3) The board may only sell a parcel that the department, in compliance with the Montana Environmental Policy Act, 75-1-201, et seq., MCA, (MEPA), determines significant for threatened or endangered species if the board provides compelling reasons for sale.

(4) If the sale of a parcel would extinguish existing, reasonable public access to other public or state trust land or to public water, as defined in 77-2-303(2)(a), MCA, the board shall reserve an easement or right of way for access to the other public or state trust land or to public water.

(5) If the sale of a parcel would extinguish access to adjacent private land, the department shall provide an opportunity for the landowner to make application to purchase an easement under 77-1-107, 77-1-130, or 77-2-101, MCA.

(6) If a person directly or indirectly creates an isolated parcel of school trust land in order to benefit from land banking, the department shall recommend that the parcel be considered nonisolated. (History: 77-2-362, MCA; IMP, 77-2-308, 77-2-363, MCA; NEW, 2004 MAR p. 2399, Eff. 10/8/04.)

36.25.804 PRELIMINARY REVIEW OF PARCELS BEFORE NOMINATION

(1) The department shall conduct a preliminary review of each parcel prior to nomination to determine whether further review is warranted. The department may consider the following factors in the preliminary review:

(a) the parcel produces low income, as calculated by:

(i) high market value and low return on the asset;

(ii) high administrative costs relative to other similar parcels; or

(iii) low potential to increase productive capacity of the land;

(b) whether the parcel is isolated. On a nonisolated parcel, the department shall describe the existing level of access;

(c) the parcel's impact on the diversity of the overall asset portfolio and within its land classification;

(d) the extent of infrastructure, such as roads, utilities, power, telephone, water, or sewer availability;

(e) the estimated net annual income from the parcel, ~~based on information in the "Report on the Return on Asset Value by Trust and Land Office for State Trust Land";~~

(f) the potential for appreciation or depreciation in the value of the parcel, based on the best available information from the local real estate market;

(g) the parcel's potential for development or value-added activities that complement local and statewide economic development;

(h) whether and to what degree the sale of the parcel would affect access to other public lands; and

(i) whether the parcel is adjacent to other public land or private land under conservation easement, as documented by current information in the Montana Natural Heritage Program database or similar source.

(2) Based on the preliminary review, the department will recommend to the nominator whether the parcel qualifies for nomination.

AUTH: 77-1-204, 77-2-362, MCA

IMP: 77-2-328, 77-2-363, MCA

36.25.805 PROCEDURES FOR NOMINATING AND EVALUATING STATE TRUST LANDS FOR SALE PURSUANT TO LAND BANKING (1) The board shall sell state trust land on a parcel-by-parcel basis.

(2) The board reserves the right to approve or deny nominations for sale of state trust land. The department reserves the right to prioritize activities related to the sale of state trust land.

(3) The board, the department, or the current lessee may nominate a parcel or parcels of state trust land for sale.

(a) Nominations must be on a form issued by the department and must be sent to the appropriate department office, as noted on the form.

(b) A lessee may nominate one or more parcels currently held by that lessee under a state of Montana surface lease agreement. The nominating lessee shall pay a nonrefundable \$100 processing fee for each parcel of land nominated.

(c) The department may not accept incomplete nominations.

(d) The department shall review the classification of the parcel, as provided in 77-1-401, MCA, and classify the parcel if it is not classified.

(e) When a parcel is nominated, the department shall notify all persons holding a license on the parcel, the representative of the trust beneficiary, and the lessee of the parcel if board or department nominated. Notice to the trust beneficiary must go to the representative identified for each trust affected by the proposed sale.

(4) If the department determines that a parcel meets the preliminary suitability requirements for sale, the department shall ~~conduct~~ contract for an environmental review of the parcel under MEPA. If the MEPA analysis determines that the sale would result in a significant adverse impact on natural resources, the parcel is generally not suitable for sale unless the board determines otherwise. If the department conducts a checklist environmental assessment under MEPA, the department shall briefly explain in writing ~~each conclusion of "no impact."~~ the potential impacts and mitigations for each resource and issue analyzed, including written explanations of resource or issue analysis conclusions of "no impact."

(5) After evaluation of the preliminary review and the MEPA analysis, the department shall determine whether a parcel is suitable for sale and report to the board on the parcel's suitability for sale.

(a) If the department determines the parcel is not suitable for sale, the department may remove the parcel from nomination and eliminate the parcel from further review without board approval.

(b) The department shall post the report required by (4), including the MEPA analysis, in a dated notice on the department's website or other equivalent electronic medium. The notice must be posted at least 15 days before the next meeting of the board will consider the sale.

(c) The department shall notify the lessee of the department's recommendation by certified mail, as provided in 77-2-363(3), MCA. As a courtesy, the department shall try to contact the lessee by telephone about the determination. The notification must be mailed on or before the day the department posts the notice on its website or other equivalent electronic medium.

(d) The department shall notify all persons holding a license on the parcel and the trust beneficiary about the determination.

(e) Any person may appeal to the board the department's removal of a parcel from nomination within 15 days of the department posting the report on the website or other equivalent electronic medium. The board shall place the appeal on the next available agenda of a regularly scheduled board meeting no later than 15 days before the meeting.

(f) On a board- or department-nominated parcel, the lessee may, within 60 days of the determination, notify the department that the lessee intends to propose a land exchange.

(6) For each parcel, the department shall conduct a title review, if necessary.

(7) Upon the department's report to the board under (4), the board shall approve or reject the proposed sale.

(a) If the board rejects the proposed sale of the parcel, the department shall remove the parcel from nomination.

(b) If the board approves the proposed sale of the parcel, the department shall post the parcel on the department's website or other equivalent electronic medium within 30 days of the board's approval.

(8) If the board has approved a proposed sale nominated by the lessee, the department will estimate the costs of the appraisal and will notify the lessee of the approval and request submission of the estimated costs of the appraisal and associated costs of preparing the parcel for sale. Payment must be made within ten days after the board has given preliminary approval of the sale under ARM 36.25.807(2)(b).

(9) If the board has approved a proposed sale, land exchange, or acquisition, the department shall contract with a Montana-licensed certified general appraiser to appraise the parcel under consideration for sale. The department will review or contract the review of the appraisal conducted by the contract appraiser.
~~shall commission an appraisal from a list of licensed, department-approved appraisers.~~

(a) The department shall ~~conduct or~~ contract for the appraisal, to be reimbursed by the appropriate party under ARM 36.25.807(2)(b) ~~or 36.25.808(8)(a).~~

(b) The appraisal must:

(i) include state-owned improvements in the valuation;

- (ii) exclude lessee-owned or licensee-owned improvements from the valuation;
- (iii) use comparable sales for like properties; and
- (iv) include details of the value of the parcel with legal access and a discount in appraised value due to lack of access; and
- (v) be reviewed and or updated one year from the date of the appraisal.
- (c) The department shall post the appraised value of the parcel in a dated notice on the department's website or other equivalent electronic medium.
- ~~(9)~~ (10) Any person may commission, at that person's own expense, another appraisal from a list of department approved appraisers.
- (a) A person commissioning another appraisal shall notify the department within 15 days of the posting of the appraised value.
- (b) Any subsequent appraisal must be completed within 60 days of notification to the department of the intent to commission the appraisal.
- (c) Any subsequent appraisal must include all elements required of the first appraisal and be submitted to the department for review.
- ~~(40)~~ (11) The department shall present to the board the first appraisal and review and any subsequent appraisals and reviews that are provided to the department.
- ~~(41)~~ (12) Upon receiving the appraisal(s) and review(s) ~~or appraisals and survey~~, the board shall set a minimum bid on the parcel. The department shall add the minimum bid to the parcel's listing on the department's website or other equivalent electronic medium.
- ~~(42)~~ (13) If the board has approved a proposed sale, the department shall make the minimum bid, contents and findings of any title review, and any environmental due-diligence review available to the public, all bidders, and the lessee.
- ~~(43)~~ (14) The department shall provide notice of the proposed sale to the following persons:
 - (a) ~~the~~ Department of Fish, Wildlife and Parks;
 - (b) ~~the~~ Department of Transportation;
 - (c) ~~the~~ Department of Environmental Quality;
 - (d) all adjacent landowners of record;
 - (e) the appropriate trust beneficiaries;
 - (f) the board of county commissioners in the county where the parcel is located;
 - (g) any surface lessees by certified mail. The notice to lessees must include an estimate of costs necessary to complete the sale if the lessees nominated the parcel; and
 - ~~(h) any surface lessees by certified mail. The notice to lessees must include an estimate of costs necessary to complete the sale if the lessees nominated the parcel.~~
 - (h) all persons holding a license on the parcel.
- ~~(44)~~ (15) If necessary, the department shall conduct a survey of the parcel or parcels proposed for sale. The department shall pay for the survey, to be reimbursed by the appropriate party under ARM 36.25.807(2)(c) or 36.25.808(7)(d).

AUTH: 77-1-204, 77-2-363, 77-2-364, MCA
IMP: 77-2-363, 77-2-364, MCA

36.25.807 TERMINATION OF LESSEE-INITIATED LAND BANKING SALE
AFTER EARNEST MONEY DEPOSIT AND PROCESSING COSTS PAID BY
LESSEE

(1) If the current lessee of the land to be sold has initiated the sale, as authorized by 77-2-361 through 77-2-367, MCA, and ~~deposited earnest money submitted processing costs~~ with the department, the lessee may cancel the sale. The lessee shall send written notice by certified mail to the department, postmarked no later than ~~30~~ ten days before the date of the auction.

(2) If the lessee cancels the sale after the department has given notice of the auction, the lessee shall pay all costs incurred by the department in preparing the sale, including but not limited to:

(a) any costs incurred for preparation of documents required by 75-1-201, et seq., MCA;

(b) appraisal;

(c) survey;

(d) cultural resource inventory;

(e) natural resource inventories;

(f) public hearings; and

(g) other costs that may be incurred by the department and or board.

(3) The ~~earnest money processing costs~~ and bid deposit, as required in ARM 36.25.805(8) and 36.25.808(4), that are paid by the lessee must be applied toward costs incurred by the department for the canceled sale.

(4) Any amount of ~~earnest money processing costs~~ and bid deposit remaining after payment of department costs must be returned to the lessee.

AUTH: 77-2-328, MCA
IMP: 77-2-328, 77-2-363, MCA

36.25.808 PROCEDURE FOR CONDUCTING STATE TRUST LAND SALES

(1) All land sales are subject to the provisions of 77-2-318 through 77-2-326, MCA.

(2) The department shall set the date of the auction. Bidders may appear personally or be represented by a legally authorized representative.

(3) As required by 77-2-322, MCA, the department shall, at a minimum, publish notice of the auction in a newspaper of general circulation in the county where the auction is to take place, once each week for four consecutive weeks preceding the due date for bid deposits. The department shall post the notice on the department's website or other equivalent electronic medium and provide links to associated realty websites when feasible.

(4) A person wishing to bid upon a nominated state trust land parcel offered for sale at auction shall submit a bid deposit and execute a purchase agreement with the department. The bid deposit and purchase agreement must be postmarked no later than 45 20 days before the date of the auction.

(5) Subject to (6), land must be sold to the highest bidder who consummates the terms of the sale.

(6) In accordance with 77-2-324, MCA, the current lessee has the preference right to match the high bid.

(7) The purchaser shall pay closing costs, including but not limited to:

- (a) the cost of the appraisal;
- (b) title insurance;
- (c) filing fees;
- (d) survey, if necessary; and
- (e) water rights transfer.

(8) The department shall retain the bid deposit and processing costs of the successful bidder. The department shall return the bid deposits of all unsuccessful bidders within five business days following the auction.

(9) If the highest bidder fails to consummate the sale for any reason, the bidder forfeits the bid deposit and processing costs. The ~~the~~ department may offer the parcel to the next highest bidder at the final sale price. If the next highest bidder, or a subsequent bidder, in sequence of bid amount, agrees to the terms of the sale, that bidder shall complete a purchase agreement and submit a bid deposit and processing costs to the department. The bid deposit and processing costs will be returned to the highest bidder if a subsequent bidder completes a purchase agreement and submits a bid deposit and processing costs.

(10) If the final bidder who agrees to consummate the sale fails to comply with the terms of the sale for any reason, that bidder's bid deposit is and processing costs are forfeit forfeited. ~~and the~~ The bid deposit must be credited to the land banking trust fund, ~~and the~~ The processing costs will be credited to the land banking administration account. ~~after deduction of sale costs incurred by the department if the department has returned their bid deposit.~~

AUTH: 77-2-362, MCA

IMP: 77-2-328, 77-2-363, MCA

36.25.809 SETTLEMENT FOR AND REMOVAL OF IMPROVEMENTS

(1) If the parcel is under an agricultural or grazing lease or license with the state at the time of sale, settlement and removal of improvements are governed by the conditions of the lease or license or by ARM 36.25.125.

(2) If the parcel is under a residential lease at the time of sale, the conditions of settlement for and removal of improvements are governed by the lease or by ARM 36.25.131.

(3) If the parcel is under a commercial lease or license with the state at the time of sale, the conditions of settlement for and removal of improvements are governed by the lease or license.

(4) In all other situations, the purchaser of the state trust land shall reimburse the former lessee for the reasonable value of those improvements the purchaser has accepted.

(5) Where there is a dispute over the value of the improvements, arbitration, as detailed in 77-6-306, MCA, must be used to set the value of improvements.

(History: 77-1-204, 77-2-308, 77-6-303, 77-6-304, 77-6-305, 77-6-306, MCA; IMP, 77-2-328, MCA; NEW, 2004 MAR p. 2399, Eff. 10/8/04.)

36.25.810 FINAL BOARD APPROVAL AND ISSUANCE OF DOCUMENTS OF CONVEYANCE (1) Before issuing documents of conveyance, the department shall present the proposed sale to the board.

(a) The board shall approve or disapprove the sale.

(b) If the ~~land~~ board disapproves the sale, the successful bidder is not responsible for costs.

(2) For the sale of land acquired from the federal government pursuant to the state's Enabling Act, the board may convey title through a state patent, pursuant to ~~77-2-341, 77-2-342, and through~~ 77-2-343, MCA.

(3) The board may convey title to other land by a grant or quit claim deed.

(4) The board may not warrant title to any land conveyed.

(5) The board may not give warranty or representation, express or implied, to a bidder for, or a purchaser of, state trust land concerning the accuracy or completeness of the title review for the property or the environmental due-diligence review investigating the presence or absence of toxic or hazardous substances.

(6) State trust land must be sold "as is."

AUTH: 77-1-204, 77-2-308, 77-2-362, MCA

IMP: 77-2-328, 77-2-363, MCA

36.25.811 THE LAND BANKING TRUST FUNDS

(1) The proceeds from a sale of state trust land must be deposited in the land banking trust fund to which the land belonged.

(2) When the board conducts a sale of state trust land pursuant to the land banking program, the board shall distribute the proceeds according to the provisions of 77-1-109, 77-2-337, 77-2-361, ~~77-2-362, 77-2-363, 77-2-364, 77-2-365, 77-2-366,~~ and through 77-2-367, MCA.

(3) Proceeds from the sale of land from ~~within individual~~ trusts may be pooled to acquire tracts of land to add to state trust land, if approved by the board after consultation with the affected beneficiaries.

(4) If land banking expires in ~~2008~~ 2011, any proceeds remaining in the state trust land bank fund must be expended by the tenth year after the effective date of each sale.

(5) Any remaining proceeds must be deposited in the appropriate permanent trust fund.

(6) The department shall account separately for individual trust receipts.

(7) If land banking is authorized beyond ~~2008~~ 2011, the proceeds in the land banking trust funds must remain intact and available for land banking ~~purposes~~ acquisitions.

AUTH: 77-2-366, MCA

IMP: 77-2-366, MCA

36.25.812 NOMINATION OF TRACTS FOR ACQUISITION (1) Any person may nominate a tract or tracts for acquisition.

(2) Nominations must be on a form issued by the department and must be sent to Land Banking, Department of Natural Resources and Conservation, P.O. Box 201601, Helena, MT 59620-1601.

(a) ~~Every person nominating land, except the department or the board, shall pay a nonrefundable \$100 fee for each tract of land nominated.~~ The department may not accept incomplete nominations.

(3) The department may contract with a third party, such as a licensed real estate agent, to act on behalf of the state in acquiring a tract or tracts.

(4) The department shall notify each trust beneficiary whose land sale proceeds would potentially support the proposed acquisition. Notice to the trust beneficiary must go to the contact person identified for each trust affected by the proposed acquisition.

(5) The department shall post all tracts nominated for acquisition on the department's web site or other equivalent electronic medium. The department shall update the status of the tract throughout the process, including all applicable reports.

AUTH: 77-2-328, MCA

IMP: 77-2-328, MCA

36.25.813 PRELIMINARY REVIEW OF TRACTS NOMINATED FOR ACQUISITION (1) The department reserves the right to prioritize activities related to the acquisition of land.

(2) The department shall obtain from the seller and evaluate a disclosure statement that describes any known material defects in the property.

(a) The seller shall provide disclosure on a form provided by the department.

(b) If the seller fails to provide disclosure within 60 days of the department's request, the tract must be considered unsuitable for acquisition.

(3) The department shall conduct a preliminary review to determine the tract's suitability for acquisition. The review must address, but is not limited to, the following factors:

(a) the financial feasibility of acquiring and managing the tract;

(b) the existing level of access; and

(c) the potential for multiple use.

(4) Concurrent with the nomination of a tract and after the preliminary review, the department may secure the ability to purchase the tract, contingent upon approval by the board, as provided in ARM 36.25.814.

(5) If the department determines a tract is not suitable for acquisition, the department shall remove the tract from nomination and eliminate it from further review.

(6) Any person may appeal to the board the department's removal of a tract from nomination within 15 days of the department posting the report on the website or other equivalent electronic medium. The board shall place the appeal on the next available agenda of a regularly scheduled meeting no later than 15 days before the meeting. (History: 77-1-204, 77-2-308, 77-2-362, MCA; IMP, 77-2-328, 77-2-364, MCA; NEW, 2004 MAR p. 2399, Eff. 10/8/04.)

36.25.814 PRELIMINARY BOARD APPROVAL TO PURCHASE LAND, EASEMENTS, OR IMPROVEMENTS (1) The department shall present the preliminary review of the nominated tract to the board.

(a) If the board disapproves acquiring a tract, the department shall remove the tract from nomination and eliminate it from further review.

(b) If the board approves the preliminary review, the department shall begin a due-diligence evaluation. (History: 77-2-362, MCA; IMP, 77-2-364, MCA; NEW, 2004 MAR p. 2399, Eff. 10/8/04.)

36.25.815 ANALYSIS, REVIEW, AND DUE DILIGENCE IN PREPARING TO ACQUIRE STATE TRUST LAND (1) The department may not purchase a tract, easement, or improvement pursuant to 77-2-361, ~~77-2-362, 77-2-363, 77-2-364, 77-2-365, 77-2-366, and through~~ 77-2-367, MCA, without preparing a financial analysis. The analysis must include:

(a) the average annual rate of return calculated over a ~~20~~ 60-year accounting period for Class 2 lands;

(b) ~~a 20-year average annual rate of return~~ the average annual rate of return calculated over a 20-year accounting period for Class 1,3 & 4 lands;

(c) a comparison with the current average annual rate of return of the parcel or parcels sold, the proceeds of which are used to fund this transaction;

(d) a prudent determination that the ~~acquisition is likely to produce more net revenue~~ lands to be acquired have a higher net present value for the affected trust or trusts ~~than the revenue that was produced from the land~~ lands sold, and a greater or equal average annual rate of return as may be reasonably expected over a 20-year accounting period for Class 1,3 and 4 lands and a 60-year accounting period for Class 2 lands, with an acceptable level of risk for the affected trust or trusts; and

(e) the expected classification of the tract under 77-1-401, MCA.

(2) Before acquiring a tract, easement, or improvement, the board shall determine that the financial risks and benefits of the purchase are prudent, financially productive investments that are consistent with the board's fiduciary duty as a reasonably prudent trustee of a perpetual trust. That duty requires the board to comply with the requirements of 72-34-114 and 77-2-364(3), ~~(4)~~, through (5), MCA.

(3) The department shall prepare a description of each proposed acquisition. The description must include the following elements:

(a) an inventory of soils, vegetation, wildlife use, mineral characteristics, public use, recreational use, aesthetic values, cultural values, surrounding land use, zoning, planning information, weeds, floodplain information, water resources, fisheries, wetlands, and riparian characteristics;

(b) whether the tract is isolated. On a non-isolated tract, the department shall describe the existing level of access;

(c) the extent of infrastructure, such as roads, utilities, power, telephone, water, or sewer availability;

(d) whether and to what degree the purchase of the tract would affect access to other public lands;

(e) whether the tract is adjacent to other public land or private land under conservation easement, as documented in current information in the Montana Natural Heritage Program database or similar source; and

(f) the status of subsurface mineral rights.

(4) Before acquiring any interest in land, the department and/or board shall conduct a due-diligence review as follows:

(a) ~~conduct or review a current appraisal compliant with the Uniform Appraisal Standards for Federal Land Acquisition of the tract to determine fair market value by using comparable sales for like properties; the department shall contract with Montana-licensed certified general appraiser to appraise the parcel under consideration for acquisition. The department will review or contract the review of the appraisal conducted by the contract appraiser. The appraisal must follow the department's current scope of work and the supplemental appraisal instructions for the property. A copy of the appraisal and review shall be provided to the board and department. The appraisal will be reviewed and/or updated one year from the date of the appraisal;~~

(b) review the title to the property proposed for acquisition and confirm that the seller is presenting a marketable title. Should the department identify any defects or encumbrances, the seller shall take steps to cure any title defects or remove the encumbrances to satisfy the department;

(c) if necessary, require a survey of the tract; and

(d) the seller shall take the necessary steps to cure defects or remove encumbrances or uses of record or not of record, as requested by the department;

~~(d)~~ (e) determine any limiting factors for future uses or development of the real property or the presence of toxic or hazardous materials. This may include, but is not limited to:

(i) phase I assessments, such as searches of government agency records and chain-of-title searches for evidence of property history and regulatory compliance, a review of permit applications, environmental health records, environmental compliance data, and other relevant information available from federal and state administrative agencies, discussions with former property owners and employees, and preliminary site visits;

(ii) phase II assessments, such as sampling of soils, water, and structural materials, well drilling, chemical analysis of samples, geotechnical survey, and a toxicological risk assessment.

(5) The department shall notify the appropriate board of county commissioners and adjacent landowners of the proposed acquisition.

AUTH: 77-2-364, MCA

IMP: 77-2-364, MCA

36.25.816 FINAL APPROVAL OF LAND ACQUISITION BY STATE LAND BOARD (1) The department shall report to the board the complete findings compiled under the requirements of ARM 36.25.815.

(2) The department shall recommend whether acquiring the tract is in the best interest of the affected trust beneficiary.

(3) When prudently necessary to protect the interests of the affected trust beneficiary, the board may reject, modify, or approve the proposed purchase of any trust asset.

(4) Acquisition of a tract may not occur without final land board approval. (History: 77-2-362, MCA; IMP, 77-2-363, MCA; NEW, 2004 MAR p. 2399, Eff. 10/8/04.)

36.25.817 DOCUMENTS OF CONVEYANCE ON LAND ACQUISITION

(1) Title to land acquired by the state must be by warranty deed. (History: 77-1-204, 77-2-308, 77-2-362, MCA; IMP, 77-2-328, MCA; NEW, 2004 MAR p. 2399, Eff. 10/8/04.)

REASONABLE NECESSITY: The amended land banking rules reflect changes in the land banking program made by Senate Bill 131 and Senate Bill 213, which were passed by Montana's 60th Legislature. The amendments revise land banking laws, add new definitions, and remove obsolete definitions.

4. The department proposes to repeal the following rule:

~~36.25.806 REQUIREMENTS FOR LAND BANKING EARNEST MONEY~~

~~DEPOSIT (1) The lessee who nominated the parcel shall submit earnest money in the sum of \$1,000 within 30 days of receiving notice from the department that the parcel is available for sale.~~

~~(2) If the lessee does not submit earnest money within 30 days of notice of availability for sale, the department shall remove the parcel from nomination unless co-nominated by the board or the department.~~

~~(3) Board and department nominated parcels do not require \$1,000 earnest money. (History: 77-1-204, 77-2-308, and 77-2-362, MCA; IMP, 77-2-328 and 77-2-363, MCA; NEW, 2004 MAR p. 2399, Eff. 10/8/04.)~~

AUTH: 77-1-204, 77-2-308, 77-2-328, MCA

IMP: 77-2-328, 77-2-363, MCA

REASONABLE NECESSITY: The requirements for the earnest money deposit are no longer applicable. The revisions to the land banking program in Senate Bill 131 have eliminated the earnest money requirement in lieu of charging processing costs for preparing the parcel for sale.

5. Concerned persons may submit their data, views, or arguments concerning the proposed amendment in writing to Emily Cooper, 1625 11th Avenue, Helena, MT 59620; telephone (406) 444-4165. Comments must be received no later than 5:00 p.m. on January 7, 2008.

6. Jeanne Holmgren, Department of Natural Resources and Conservation, has been designated to preside over and conduct the hearing.

7. An electronic copy of this Notice of Proposed Amendment is available through the department's site on the World Wide Web at <http://www.dnrc.mt.gov>. The department strives to make the electronic copy of this Notice of Public Hearing on Proposed Amendment conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered.

8. The agency maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request which includes the name, e-mail, and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding conservation districts and resource development, forestry, oil and gas conservation, trust land management, water resources or a combination thereof. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written requests may be sent or delivered to the contact person in (5) above or may be made by completing a request form at any rules hearing held by the department.

9. The bill sponsor notice requirements of 2-4-302, MCA, apply and have been fulfilled. The bill sponsor was notified by [regular/ e-mail] on [DATE].

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

/s/
MARY SEXTON
Director
Natural Resources and Conservation

/s/
TOMMY H. BUTLER
Rule Reviewer

Certified to the Secretary of State [DATE].